

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-10353-RGS

JOSEPH AGUIAR

v.

LOIS RUSSO, et al.

MEMORANDUM AND ORDER

April 28, 2009

STEARNS, D.J.

On March 9, 2009, Joseph Aguiar, a resident of New Bedford, Massachusetts, filed a pro se federal civil rights action pursuant to 42 U.S.C. § 1983 (section 1983), against Lois Russo, Superintendent of the Souza Baranowski Correctional Center (SBCC), Assistant District Attorneys Joan M. Fund and Renee P. Dupuis, and the Commonwealth of Massachusetts. The case arises out of Aguiar's state criminal prosecution. Aguiar contends that he was held in custody as a pretrial detainee beyond the time limit authorized by Mass. Gen. Laws ch. 276, § 58A (section 58A), and in violation of his right to a speedy trial.<sup>1</sup> Aguiar requests to proceed *in forma pauperis*. For the reasons set forth below, the Motion for Leave to Proceed *in forma pauperis* is ALLOWED. However, within thirty-five (35) days of the date of this Memorandum and Order, Aguiar shall show cause as to why this action should not be dismissed.

BACKGROUND

On November 15, 2005, the Bristol County Grand Jury indicted Aguiar on various

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<sup>1</sup>Mass. Gen. Laws ch. 276, § 58A(3), states in relevant part that: “[a] person detained under this subsection shall be brought to trial as soon as reasonably possible, but in absence of good cause, the person so held shall not be detained for a period exceeding ninety days excluding any period of delay as defined in Mass. R. Crim. P. 36(b)(2).”

criminal charges. He was arraigned on December 8, 2005. At the arraignment, the Commonwealth moved to hold Aguiar without bail at SBCC pursuant to section 58A on grounds of dangerousness. After a hearing on December 20, 2005, a state judge agreed and ordered Aguiar held without bail for up to ninety days. After the ninety days expired, Aguiar, proceeding *pro se*, filed a petition for writ of habeas corpus. A hearing was held in the state court and, ultimately, Aguiar was released on bail.

During the course of the criminal proceedings, Aguiar filed over forty motions and two interlocutory appeals. His trial date, which was originally set for September 11, 2006, was twice rescheduled as a result. The trial was eventually held on December 21, 2006, and Aguiar was acquitted. On July 16, 2008, Aguiar filed an application for compensation after acquittal pursuant to Mass. Gen. Laws ch. 277, § 73. See Commonwealth v. Aguiar, 24 Mass. L. Rptr. 311, 2008 WL 2876530 (Mass. Super. 2008). The Superior Court held that Aguiar had consented to at least six months of the pre-trial delay, and had been responsible for much of the rest by reason of his litigiousness. The request for compensation after acquittal was denied.

In this case, Aguiar claims that the defendants applied section 58A in his case in violation of the Fourteenth Amendment of the United States Constitution. Additionally, he claims that the statute violates Articles I, X, and XII of the Massachusetts Declaration of Rights, principally because it fails to provide for an automatic hearing prior to the expiration of the 90-day detention order. Aguiar seeks declaratory relief and compensation for his “excess” confinement and imprisonment without due process of law.

### DISCUSSION

Because Aguiar is proceeding *in forma pauperis*, his Complaint is subject to

screening under 28 U.S.C. § 1915(e)(2).<sup>2</sup> This statute authorizes federal courts to dismiss actions in which a plaintiff seeks to proceed without prepayment of fees if the action is malicious, frivolous, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2); Denton v. Hernandez, 504 U.S. 25, 32-33 (1992); Neitzke v. Williams, 490 U.S. 319, 325 (1989). A complaint filed *in forma pauperis* may be dismissed *sua sponte* and without notice under section 1915 if it is based on a meritless legal theory or factual allegations that are clearly baseless. Id.; Denton, 504 U.S. at 32-33.<sup>3</sup>

#### Sovereign Immunity

Aguiar's civil rights claims against the Commonwealth under federal and state law are precluded by the Eleventh Amendment.<sup>4</sup> See Alabama v. Pugh, 438 U.S. 781 (1978) (*per curiam*). See also Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985) ("Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, . . . a State cannot be sued directly in its own name regardless of the relief sought."). Cf. Brown

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<sup>2</sup>Upon review of Aguiar's financial disclosures, the court finds that he lacks sufficient funds to pay the \$350.00 filing fee for this action. Accordingly, his Motion for Leave to Proceed *in forma pauperis* is hereby ALLOWED.

<sup>3</sup>In conducting this review, the court liberally construes a *pro se* complaint. See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Haines v. Kerner, 404 U.S. 519, 520 (1972); Instituto de Educacion Universal Corp. v. U.S. Dep't of Educ., 209 F.3d 18, 23 (1st Cir. 2000).

<sup>4</sup>The Eleventh Amendment to the United States Constitution provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

v. Newberger, 291 F.3d 89, 92 (1st Cir. 2002) (there has been no unequivocal abrogation by Congress of the Commonwealth's Eleventh Amendment immunity for purposes of section 1983).

### Prosecutorial Immunity

Aguiar's civil rights claims against Assistant District Attorneys Fund and Dupuis are based on their failure to cause him to be released from custody or to be tried promptly within speedy trial constraints. The claims are not viable because a prosecutor possesses absolute immunity from suit under section 1983 for acts that are intimately associated with the judicial phase of the criminal process. Imbler v. Pachtman, 424 U.S. 409, 422-423 (1976). "In initiating a prosecution and in presenting the State's claim, the prosecutor is immune from a civil suit for damages under § 1983." Id. at 430. The rationale behind the doctrine is plain: "[I]t is 'better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'" Reid v. State of New Hampshire, 56 F.3d 332, 337 (1st Cir. 1995), quoting Imbler, 424 U.S. at 428. Absolute prosecutorial immunity does not apply when a prosecutor is performing certain functions ancillary to the judicial process. See Van De Kamp v. Goldstein, 129 S.Ct. 855, 861 (2009) ("[A]bsolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks."). This case does not present such a circumstance. Aguiar's claim against the prosecutors is based on their continued prosecution of him, their failure to take actions not to prosecute him further, and their failure to take actions to ensure his release from custody during the course of pending criminal proceedings. These claims fundamentally implicate the core of the prosecutorial function. See Querubin v.

Commonwealth, 440 Mass. 108, 113 (Mass. 2003) (“The government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, and confinement of such persons pending trial is a legitimate means of furthering that interest.”).<sup>5</sup>

### Supervisory Liability

Turning to Aguiar’s claims against Superintendent Russo: Massachusetts law provides that superintendents of correctional facilities are responsible for “the custody and control of all prisoners in the correctional institution, and shall govern and employ them pursuant to their respective sentences until their sentences have been performed or they are otherwise discharged by due course of law,” Mass. Gen. Laws ch. 125, § 14. Even assuming that the statute gives rise to private right of action, Aguiar has failed to set forth facts sufficient to state a cognizable claim. Russo’s statutory duty was to maintain custody of Aguiar until he was “discharged by due course of law,” either a court order or statute mandating his release. As the gist of Aguiar’s Complaint makes clear, there is no Massachusetts law that would have guaranteed his immediate discharge upon the expiration of the 90-day detention period (nor had any court ordered his release). Thus,

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<sup>5</sup>The Massachusetts Superior Court Judge who heard Aguiar’s compensation for acquittal case found:

that although Aguiar was acquitted, the Commonwealth’s case was strong. In the Court’s seasoned judgment, Aguiar was fortunate to have been acquitted. This is not a situation where, in retrospect, an obviously innocent person was held in custody for a lengthy period. Nor is it a situation where the duration of the pretrial confinement was exclusively caused by the prosecution.

Aguiar, 2008 WL 2876530, at \*5.

there is no duty that Russo could be said to have violated (indeed, to have released Aguiar on her own authority would have been a severe breach of the statutory command of section 14).<sup>6</sup>

Challenges to Mass. Gen. Laws ch. 276, § 58A

“One whose personal interests are directly affected by the operation of a statute can question its validity.” Cote-Whitacre v. Department of Public Health, 446 Mass. 350, 374 (2006). Rule 5.1 of the Federal Rules of Civil Procedure governs the manner in which constitutional challenges to a state statute may be raised in federal court. Specifically, Rule 5.1(a) requires a precise identification of the constitutional issue being raised and service on the state attorney general of notice of the challenge. The attorney general then, pursuant to 28 U.S.C. § 2403, has a 60-day window of opportunity in which to intervene. Fed. R. Civ. P. 5.1(c). Here, however, none of the prerequisites have been met.<sup>7</sup> Aguiar’s

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<sup>6</sup>Aguiar’s allusion to Mass. Gen. Laws ch. 276, § 58A(7), which requires that a clerk or detaining authority notify the district attorney when a petition for a review of detention is filed, has no discernible legal or factual relevance to any potential liability on the part of Russo.

<sup>7</sup>See Bugg v. Rutter, 2009 WL 613584 (W.D. Mo. Mar. 10, 2009) (proper defendants for challenging the constitutionality of a state statute are state officials responsible for its enforcement); Gundaker/Jordan Am. Holdings, Inc. v. Clark, 2008 WL 4550540, \*3 (E.D. Ky. 2008) (constitutional challenge to state statute not properly before the court because plaintiff failed to satisfy the requirements of Fed. R. Civ. P. 5.1 requiring notice to state attorney general: “[w]hile the rule prevents the court from invalidating a state statute without giving the state attorney general the opportunity to intervene, the court retains the authority to deny the challenge.”); Burghart v. Corr. Corp. of Am., 2008 WL 820178, \*1 (W.D. Okla. 2008) (dismissal of a constitutional challenge may be made at any time, even before service of process); Reliable Tractor, Inc. v. John Deere Constr. & Forestry, 2007 WL 4373555 (M.D. Ga. 2007) (requiring challenger to file a notice of constitutional question per Rule 5.1 and to serve notice and paper on state attorney general within a specified time period).

Complaint does not set out a constitutional challenge to section 58A as a separate cause of action or seek a declaration that the statute itself is unconstitutional; it does not identify the defendants from whom relief is sought; nor does it name these defendants in their official capacities. The Complaint simply asserts that the Commonwealth has “enacted a detention scheme with inadequate safeguards.” Complaint ¶ 31. The court will not imply a cause of action that a plaintiff has not pled, or certify a constitutional question of its own imagining to the Massachusetts Attorney General.<sup>8</sup>

#### Speedy Trial Claims

Any section 1983 claim for a violation of Aguiar’s right to a speedy trial, if raised (the Complaint is not clear on this point), is barred by *res judicata*, the matter having been fully litigated in the Superior Court.<sup>9</sup> See Aguiar, 2008 WL 2876530, at \*5.

#### Supplemental Jurisdiction

Under 28 U.S.C. § 1367, a “district court may decline to exercise supplemental jurisdiction” if “the district court has dismissed all claims under which it has original jurisdiction.” 28 U.S.C. § 1367(c); see Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir. 1995) (“As a general principle, the unfavorable disposition of a plaintiff’s

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<sup>8</sup>I note that in addition to the lack of an automatic mechanism for release (or any entitlement to an automatic bail review upon the expiration of the 90-day period), section 58A places the initial burden on the pretrial detainee to seek habeas-type relief if detained beyond the 90-day period. Mass. Gen. Laws ch. 276, § 58A(7).

<sup>9</sup>Under the doctrine of *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action. Havercombe v. Dep’t of Educ., 250 F.3d 1, 3 (1st Cir. 2001) (citation omitted). A court on notice that the issue has previously been decided may dismiss an action *sua sponte*, consistent with the *res judicata* policy of avoiding judicial waste. In re Medomak Canning, 922 F.2d 895, 904-905 (1st Cir. 1991) (citations omitted).

federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims.”). See also Cao v. Puerto Rico, 525 F.3d 112, 116 (1st Cir. 2008) (where no federal cause of action remained, “district court was well within its discretion in declining to exercise its supplemental jurisdiction over the remaining state law claims.”).

#### Order to Show Cause

Aguiar is given notice of the intention of the court to dismiss the federal claims raised in his Complaint and to decline jurisdiction over the supplemental state claims thirty-five (35) days from the date of this Order unless he can show cause that the identified pleading deficiencies can be corrected. Aguiar’s show-cause response, if any, is limited to seven (7) double-spaced written pages. Failure to comply with the directives contained in this Order will result in a dismissal of the action forthwith. No summonses shall issue pending further Order of the court.

#### CONCLUSION

For the foregoing reasons, it is hereby Ordered that:

1. Plaintiff’s Motion for Leave to Proceed *in forma pauperis* (Docket No. 2) is ALLOWED; and
2. Within thirty-five (35) days of the date of this Order, plaintiff shall show cause why this action should not be dismissed for the reasons stated herein.

SO ORDERED.

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UNITED STATES DISTRICT JUDGE